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Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone – Law and Practice

James Harrison

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Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone – Law and Practice

*James Harrison**

Abstract: This paper addresses the issue of enforcement powers of coastal states within the exclusive economic zone (EEZ) and the situations in which those powers may be exercised against ships navigating in this zone. It reflects upon the nature of the powers conferred upon coastal states, as well as the safeguards that are imposed upon the exercise of those powers. In particular, the paper will consider how the law of the sea strikes a balance between the interest of coastal states in ensuring that rules and regulations in the EEZ are enforced and the interest of flag states in ensuring that there is no encroachment upon legitimate freedom of navigation. The paper will consider the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as how these provisions have been interpreted and applied in practice in the jurisprudence of the International Tribunal for the Law of the Sea.

1. Introduction

One of the major outcomes of the Third United Nations Conference on the Law of the Sea (UNCLOS III) was the extension of coastal state jurisdiction. Delegates agreed to the creation of a number of new maritime zones, one of the most significant of which was the exclusive economic zone (EEZ). According to this new doctrine, the coastal states were granted sovereign rights and exclusive jurisdiction over a range of issues in waters up to 200 nautical miles from their coast. Within the EEZ, coastal state has sovereign rights over living and non-living resources, as well as ‘other activities for the economic exploitation and exploration of the zone.’¹ Coastal states also have sovereign jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.² At the same time, the interests of other states were protected and they continued to enjoy, ‘subject to the relevant provisions of [the] Convention’, certain fundamental freedoms, including the freedom of navigation.³ Thus, in interpreting and applying the Convention, it is necessary to bear in mind the balance between the interests of coastal states and flag states.

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¹ 1982 United Nations Convention on the Law of the Sea (hereafter, Law of the Sea Convention), Art. 56(1)(a).

² Law of the Sea Convention, Art. 56(1)(b).

³ Ibid, Art. 58(1).

This paper will address the extent of enforcement powers conferred upon coastal states within the EEZ and the situations in which those powers may be exercised against ships navigating in this zone. The arrest and detention of foreign vessels was considered to be ‘a particularly sensitive matter’⁴ during the negotiation of the Convention. Maritime states, defending their interest in navigational freedom, were not willing to confer comprehensive powers of enforcement on coastal states in this new zone. Thus, an important part of the compromise negotiated at UNCLOS III was the imposition of certain safeguards associated with the exercise of these new competences. It is the nature and scope of these safeguards that will be the focus of this paper.

There is no single set of safeguards that apply to all of the enforcement powers conferred on the coastal state. Rather, the safeguard provisions are to be found scattered throughout the Convention. The paper will explore the range of safeguards that are applied to enforcement powers in the EEZ, but also discuss the nature of these safeguards and what they tell us about the balance between coastal state jurisdiction and freedom of navigation. Many of these safeguards employ terms such as ‘necessary’, ‘reasonable’ or ‘appropriate’ in order to delineate this balance. As noted by Franckx, the use of such drafting techniques postpones the decision as to the precise balance between coastal state and flag state interests.⁵ Essentially, the drafters chose to delegate the task of striking the balance to courts and tribunals in interpreting and applying the Convention. Thus, the analysis provides an opportunity to reflect upon the jurisprudence that has emerged since the entry into force of the Convention and to assess whether it provides satisfactory guidance on this important topic.

2. Powers of Arrest in the EEZ and Applicable Safeguards

The Convention does not have a single provision on the ability of a coastal state to arrest vessels suspected of violating its laws and regulations in the EEZ. Rather, the issue is addressed in relation to each individual competence. In some cases, the Convention is explicit in detailing the enforcement powers of the coastal state. In other cases, no enforcement powers are expressly conferred on the coastal state and

⁴ B.H. Oxman, ‘Observations on Vessel Release under the United Nations Convention on the Law of the Sea’ (1996) 11 *I.J.M.C.L.* 201-215, 202.

⁵ E. Franckx, “‘Reasonable Bond’ in the Practice of the International Tribunal for the Law of the Sea’ (2001-2002) 32 *C.W.Int’l.L.J.* 303-342, 309.

therefore one must first enquire whether such powers exist, before asking what limits may apply thereto.

2.1 Powers of Arrest and Specific Safeguards in relation to Fisheries Offences

One of the driving forces behind the establishment of the EEZ was the demand by many coastal states for stronger rights to the living resources in their adjacent waters. The issue had been raised at previous law of the sea conferences, yet it had not been possible to reach a settlement.⁶ Nevertheless, the issue continued to cause problems.⁷ Finally, a compromise was reached whereby coastal states were granted sovereign rights for the purposes of conserving and managing fish stocks within 200 nautical miles of the territory.⁸ Foreign fishing vessels were only permitted access to those living resources with the agreement of the coastal state.

The power of a coastal state to exercise enforcement powers over foreign fishing vessels is explicitly addressed in Article 73 of the Convention.⁹ Coastal states can exercise enforcement powers both against vessels which are not authorized to fish in its EEZ, as well as to ensure compliance with laws and regulations by those vessels which are authorized to fish therein. Amongst the enforcement measures explicitly listed in Article 73(1) are ‘boarding, inspection, arrest and judicial proceedings.’ Thus, there is no doubt that the officials of the coastal state may stop and search a suspect vessel and, if there is evidence of a violation, they may bring the vessel to port and start criminal proceedings in national courts.

However, this power is also subject to certain safeguards, designed to ensure that the coastal state does not encroach upon the legitimate rights and interests of other states when exercising these powers. First and foremost, Article 73(1) requires that enforcement measures taken by the coastal state must be ‘necessary.’ This necessity standard is central to determining the balance between coastal state rights

⁶ The issue had been dealt with in Articles 6-7 of the 1958 Convention on Fishing and Conservation on the High Seas, but many states remained unsatisfied with this solution and the treaty received very little support. Coastal state rights over fish stocks was thus one of the questions that was submitted to the Second UN Conference on the Law of the Sea, but this conference was also unable to come to a satisfactory compromise. Conference Resolution II simply noted that ‘the development of international law affecting fishing may lead to changes in practices and requirements of many states.’

⁷ Notably, a major dispute over the rights of a coastal state to regulate fisheries in its coastal waters was brought to the International Court of Justice a few years before the commencement of negotiations at UNCLOS III: see *Fisheries Jurisdiction Cases* (1974) ICJ Reports 3 and 175.

⁸ Law of the Sea Convention, Art. 56(1)(b).

⁹ See also *ibid*, Art. 62(4)(k), which lists ‘enforcement procedures’ amongst the matters that may be regulated by the coastal state in relation to nationals of other states fishing in the EEZ.

and the interests of other states. The inclusion of this phrase means that the enforcement actions of the coastal state are subject to some scrutiny by an international court or tribunal. As explained by Judge Paik in his separate opinion in the *M/V Virginia G Case*, ‘the notion of necessity attempts to balance two conflicting interests at play: namely, preserving the freedom of a state to achieve the objective it seeks through means of its choosing, and restraining the state from choosing means that would unduly infringe the protected rights or interests of another entity, be it an individual or a state. The notion of necessity understood this way can be characterized essentially as a “balancing test.”’¹⁰ The question is what standard of review will be adopted by a court or tribunal when interpreting this provision and determining whether an appropriate balance has been struck.

At the outset, it must be remarked that the term ‘necessary’ is open-ended. As noted by the WTO Appellate Body, the term can have a range of meanings from ‘indispensable’ to ‘making a contribution to.’¹¹ This leaves a lot of discretion to a court or tribunal as to how much leeway it gives to the coastal state in its enforcement decisions.

In the *M/V Virginia G Case*, the Tribunal simply noted that ‘neither the boarding and inspection nor the arrest of the *M/V Virginia G* violated article 73, paragraph 1, of the Convention’¹², without any explanation of its finding. Thus they did not clarify how this standard should be interpreted in the context of enforcement measures.¹³

It is suggested that the fact that the coastal state is exercising sovereign rights should have an important bearing on how this standard is interpreted. The notion of sovereign rights suggests that the coastal state should have a broad margin of appreciation in exercising its enforcement powers. This view has been expressed in a slightly different context by Vice President Hoffman and Judges Rao, Marotta Rangel, Kateka, Gao, and Bouguetaia, who argued that ‘[t]he term “sovereign rights” ought to carry with it a degree of deference to the coastal state in its exercise of those

¹⁰ *M/V Virginia G Case*, Separate Opinion of Judge Paik, para. 9. See also para. 24: ‘In the balancing test, the relative importance of those interests to the respective state or states is an important factor to be considered in assessing whether a measure in question is necessary.’

¹¹ *Korea – Various Measures on Beef*, WTO Appellate Body Report, 11 December 2000, para. 161.

¹² *M/V Virginia G Case*, ITLOS Judgment of 14 April 2014, para. 265.

¹³ The Tribunal did interpret and apply the test in Article 73(1) in the context of sanctions applied by the coastal state, as discussed below.

rights, unless such deference is denied by the Convention itself.’¹⁴ It does not follow that the coastal state has complete deference in this regard. The necessity test is after all a justiciable standard that can be applied by courts and tribunals. Yet, coastal states should not be found in violation of Article 73(1) unless their action can be shown to be arbitrary or patently unreasonable.

It must also be borne in mind that whether or not an enforcement measure is necessary will depend upon the facts of the particular case. In relation to the inspection and arrest of vessels engaged in fishing the EEZ, the coastal state should arguably have greater discretion. According to one author, the coastal state may inspect fishing vessels ‘as a matter of right.’¹⁵ Indeed, the exercise of this power would appear to be necessary for the coastal state to ensure that its national laws and regulations are being followed by fishing vessels. However, the more intrusive the powers exercised by the coastal state, the more justification they may require. Therefore, the decision to arrest a vessel may not always be necessary unless there is *some* evidence of an offence. In other words, Article 73(1) would appear to contain an implicit evidential threshold for the exercise of enforcement powers, requiring there to be reasonable grounds for believing that an offence has taken place.¹⁶

Similarly, if a foreign fishing vessel is merely navigating through the EEZ, it is arguable that a coastal state should have to show *some* evidence that an offence has been committed before exercising any enforcement powers over that vessel. This would be the case even in the case of an inspection of the vessel, as inspection itself amounts to an interference with the freedom of navigation being exercised by the vessel. Again, it is appropriate to impose a minimum evidential threshold on the coastal state to prevent it from abusing its enforcement powers.

Yet, in both situations, the evidential threshold should not be set too high. Doing so, would undermine the sovereign rights of the coastal state. We will return to this issue when discussing the necessity of penalties below.

2.2 Powers of Arrest and Specific Safeguards in relation to Environmental Offences

¹⁴ *M/V Virginia G Case*, Dissenting Opinion of Vice President Hoffman and Judges Rao, Marotta Rangel, Kateka, Gao, and Bouguetaia, para. 49.

¹⁵ D. Anderson, ‘Investigation, Detention and Release of Foreign Vessels under the UN Convention on the law of the Sea of 1982 and Other International Agreements’ (1996) 11 *I.J.M.C.L.* 165-177, 171.

¹⁶ Compare the explicit evidential threshold in relation to pollution offences, below.

Article 56 of the Convention confers on the coastal state ‘jurisdiction as provided for in the relevant provisions of this Convention with regard to ... the protection and preservation of the marine environment.’¹⁷ The precise powers of the coastal state in this regard are elaborated in Part XII of the Convention, which permits the coastal state to regulate dumping¹⁸ and pollution by ships.¹⁹

The coastal state has a broad power to regulate dumping within the EEZ and the Convention makes clear that ‘dumping ... shall not be carried out without the express prior approval of the coastal state.’²⁰ Indeed, the coastal state is required to ensure that its national laws are at least as effective as global rules and standards on dumping, emphasizing that this is a matter that should be strictly controlled.²¹ To this end, Article 216 explicitly confers a power on the coastal state to enforce laws and regulations for the prevention, reduction and control of pollution of the marine environment by dumping in its EEZ.²² This provision does not explicitly define the enforcement powers to be exercised by the coastal state, although it is reasonable to assume that it includes the inspection, arrest and initiation of proceedings against a vessel suspected of having violated relevant laws and regulations. However, some safeguards do apply to the exercise of these enforcement powers. Firstly, the Convention explicitly provides that enforcement activities must be carried out by a vessel that is identifiable as being on government service.²³ Secondly, any inspection must not delay the vessel any longer than is necessary.²⁴ Thus, a necessity analysis is applied to the investigation of vessels in a similar way to fishing offences. The provision would equally apply to a situation where an inspection is carried out in a manner that unduly delays the ships, as well as the situation where there was no evidence for an inspection in the first place. As in the case of fisheries enforcement, it is suggested that the necessity of inspection and arrest will depend upon there being some evidence of an offence, albeit a low threshold. Unlike fisheries enforcement, in the case of environmental offences, states are also required to provide a national remedy for any damage or loss that may be attributable to measures which exceed

¹⁷ Law of the Sea Convention, Art. 56(1)(b)(iii).

¹⁸ Ibid, Art. 210(5).

¹⁹ Ibid, Art. 211(5)-(6).

²⁰ Ibid, Art. 210(5).

²¹ Ibid, Art. 210(6).

²² Ibid, Art. 216(1)(b).

²³ Ibid, Art. 224.

²⁴ Ibid, Art. 226(1)(a).

those which are reasonably required.²⁵ Finally, if the coastal state does find evidence that dumping has taken place and it initiates judicial proceedings against the vessel, it is obliged to suspend such proceedings if proceedings are also initiated within six months by the flag state of the vessel.²⁶ This reflects the fact that jurisdiction over the marine environment is shared between the coastal state and the flag state. In practice, this provision confers a right of preemption on the flag state. The only situation in which such a suspension is not required is if the offence relates to a case of major damage to the coastal state or if the flag state has a record of failing to effectively enforce pollution laws against its vessels.²⁷

Less discretion is given to coastal states in relation to other environmental offences by foreign vessels. The legislative jurisdiction of the coastal state over pollution from ships is limited by reference to ‘generally accepted international rules and standards.’²⁸ This limitation ensures that coastal states cannot hamper freedom of navigation by the prescription of overly restrictive unilateral standards. Coastal states are also granted an explicit power of detention and instituting proceedings against the vessel.²⁹ However, this power is subject to stringent conditions and the precise enforcement measures that may be taken by the coastal state will depend upon a number of factors.³⁰ Where there are clear grounds for believing that a vessel has committed a pollution offence in the EEZ, the coastal state may ‘require the vessel to give information regarding its identity and port of registry, its last and next port of call and other relevant information required to establish whether a violation has occurred.’³¹ It is clear from this provision that it is intended to allow the coastal state to gather relevant information which may be passed on to another state (port state or flag state) to initiate proceedings in accordance with the Convention. However, it falls far short of empowering the coastal state to take enforcement action itself. It is only in the situation where there are clear grounds for believing that a vessel has committed an offence ‘resulting in a substantial discharge causing or threatening significant pollution of the marine environment’ that a coastal state may even

²⁵ Ibid, Art. 232.

²⁶ Ibid, Art. 228(1).

²⁷ Ibid, Art. 228(1).

²⁸ Ibid, Art. 211(5).

²⁹ Ibid, Art. 220(6).

³⁰ Anderson (n 16) 174: ‘Paragraphs 3 to 7 lay down graduated responses to cases where there are clear grounds for believing that violations of international rules and standards for the prevention of pollution in the exclusive economic zone have been committed.’

³¹ Law of the Sea Convention, Art. 220(3).

contemplate the inspection of a vessel at sea.³² Furthermore, such investigations must be carried out in a way that does not delay the vessel any longer than is necessary³³ and, as in the case of dumping, it must allow claims in its national law for any damage or loss that may be attributable to measures which exceed those which are reasonably required.³⁴ Detention of a vessel following inspection is only permissible if there is ‘clear objective evidence’ of a violation that results in ‘a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state, or to any resources of its territorial sea or exclusive economic zone.’³⁵ Thus, in the case of pollution offences, the evidential threshold is explicit. Clear objective evidence is obviously a high standard³⁶ and there is also a very high threshold of damage that must have been caused before enforcement action may be taken, which leads to the conclusion that this power is clearly only intended to apply to the rarest of circumstances.³⁷ Yet, the terms are also ambiguous and therefore there may still be a role for courts and tribunal deciding whether the action taken by coastal states is lawful or not.

2.3 The Power of Arrest and Specific Safeguards in relation to Safety Zones around Artificial Islands, Installations and Structures in the EEZ

The Convention confers on the coastal state ‘the exclusive right to construct and to authorize and regulate the construction, operation and use of’ all artificial islands and other installations and structures to be used for an economic purpose within the EEZ.³⁸ In addition, ‘the coastal state may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.’³⁹ It is possible that the coastal state could even prohibit freedom of navigation in a safety zone for the purposes of ensuring the safety of offshore operations. However, the Convention is ambiguous as to what precise

³² Ibid, Art. 220(5).

³³ Ibid, Art. 226(1).

³⁴ Ibid, Art. 232.

³⁵ Ibid, Art. 220(6).

³⁶ See A. Pozdnakova, *Criminal Jurisdiction over Perpetrators in Ship-Source Pollution Cases* (Martinus Nijhoff Publishers, 2012) 109.

³⁷ It is worth noting that the right of preemption of a flag state under Article 228(1) of the Convention would not apply in this situation as the existence of ‘major damage’ is a condition of the exercise of this jurisdiction.

³⁸ Law of the Sea Convention, Art. 60(1).

³⁹ Ibid, Art. 60(2).

measures may be taken to enforce such laws and regulations.⁴⁰

It can be argued that the concept of ‘appropriate measures’ under Article 60(2) includes the power to arrest a vessel if it violates the regulations adopted by the coastal state in a safety zone. As noted by Judge Golitsyn in the *Arctic Sunrise Case*, ‘Laws and regulations enacted by the coastal state in furtherance of its exclusive jurisdiction under article 60, paragraph 2, of the Convention would be meaningless if the coastal state did not have the authority to ensure their enforcement. Consequently, it follows from article 60, paragraph 2, of the Convention that the coastal state has the right to enforce such laws and regulations, including by detaining and arresting persons violating laws and regulations governing activities on artificial islands, installations and structures.’⁴¹

It is also clear from Article 60(2) that the coastal state does not have complete discretion in determining whether to exercise its enforcement powers. There are a number of conditions which attach to the powers of the coastal state in this context. Firstly, the laws and regulations which are being enforced must be necessary and reasonable in the first place. In this regard, the Convention explicitly requires that ‘artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.’⁴² Thus, the impact on freedom of navigation should be limited at the outset by the design of the safety zones. The Convention also requires that enforcement measures must be ‘appropriate.’ As with the safeguards that are applicable to the other rights in the EEZ, the interpretation of this provision requires the striking of a balance between the rights of the coastal state and the interests of other states.⁴³ Yet, the choice of the term ‘appropriate’ would seem to suggest a margin of appreciation for the coastal state at least as broad as the case of fisheries offences, if not broader. It follows that there will be very few situations in which the arrest and prosecution of vessels for the violation of a safety zone will not be appropriate.

⁴⁰ See D. Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, 1987) 90; M. Nordquist et al (eds), *United Nations Convention on the Law of the Sea 1982 – A Commentary*, vol. 2 (Martinus Nijhoff Publishers, 1993) 586.

⁴¹ *Arctic Sunrise*, Dissenting Opinion of Judge Golitsyn, para. 23.

⁴² Law of the Sea Convention, Art. 60(7).

⁴³ See Attard (n 40) 91: ‘the framework proposed by Article 60 attempts to create a balance between the exclusive right to establish artificial islands etc., and the community’s navigational interests.’

2.4 The Power of Arrest and Specific Safeguards in relation to Marine Scientific Research in the EEZ

Article 56 of the Convention confers to the coastal state ‘jurisdiction as provided for in the relevant provisions of this Convention with regard to ... marine scientific research.’⁴⁴ Further detail on the extent of this jurisdiction can be found in Article 246 of the Convention, which provides in its opening paragraph that ‘[c]oastal states, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.’⁴⁵ The relevant provisions clearly require the consent of the coastal state for any research project conducted in the EEZ, although the mechanisms for granting that consent vary depending on the precise circumstances.⁴⁶

This article makes no mention of any powers of enforcement against vessels engaged in marine scientific research. Attard concludes from this omission that the only enforcement power available to a coastal state is the ability to suspend or terminate a project in accordance with Article 253; he says that ‘in ensuring that the researching state does not violate its rights, [the coastal state] may suspend or cease the project but cannot, for example, arrest the researching vessel.’⁴⁷ It must be wondered, however, whether there are no situations in which the coastal state could arrest a research vessel if it was failing to comply with the conditions that had been attached to the research project by the coastal state. To the contrary, Article 298(1)(b) refers to ‘law enforcement activities’ in the context of marine scientific research and the ordinary meaning of this term arguably include the power to inspect and arrest a vessel that had violated the relevant legal framework. Moreover, as a matter of policy, it would seem that the coastal state should have the ability to arrest and bring proceedings against that vessel in order to protect its exclusive rights. At the same time, as with the other areas of EEZ competence, it may be necessary to impose some sort of evidential threshold on the coastal state in order to prevent the abuse of this enforcement power. Without such a safeguard, the coastal state may be able to undermine the balance between its own rights and the freedom of navigation of other states.

⁴⁴ Law of the Sea Convention, Art. 56(1)(b)(ii).

⁴⁵ Ibid, Art. 246(1).

⁴⁶ Ibid, Art. 246(2)-(6).

⁴⁷ Attard (n 40) 117.

2.5 General Safeguards on the Power of Arrest in the EEZ

In addition to the specific safeguards on arrest discussed above, there are a number of other conditions that apply to the exercise of this power over vessels in the EEZ.

Firstly, Article 225 of the Convention provides that ‘in the exercise under this Convention of their powers of enforcement against foreign vessels, states shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.’ Although this provision is found in Part XII relating to the protection of the marine environment, it refers to the exercise of powers of enforcement ‘under this Convention’ and it therefore applies to all enforcement activities.⁴⁸ This provision is quite broad and it could cover a range of limitations on the enforcement jurisdiction of a state, including the manner in which arrests are carried out.

In practice, the regulation of arrests by coastal states has not been addressed through the prism of Article 225, but rather through general rules of international law. It is generally accepted that the powers of the coastal state include the possibility to use force where necessary.⁴⁹ The regulation of the use of force is not expressly dealt with in the Convention. However, in the *M/V Saiga (No. 2) Case*, the Tribunal held that ‘[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.’⁵⁰ On the facts of that particular case, the Tribunal found that the Guinean authorities had violated these rules, by firing live ammunition from a fast-moving patrol boat without warnings and by firing indiscriminately while on the deck of the vessel, including using gunfire to stop the engine of the ship.⁵¹

The problem with the approach of the Tribunal in this case is that it is not entirely clear that it had jurisdiction to deal with a claim based on rules that are not contained in the Convention. Article 293 of the Convention does permit the

⁴⁸ This interpretation was confirmed by ITLOS in the *M/V Virginia G Case* (n 13) para. 373.

⁴⁹ *Ibid*, para. 360. See also Nordquist (n 40) 794.

⁵⁰ *M/V Saiga Case (No. 2)*, ITLOS Judgment of 1 July 1999, para. 155.

⁵¹ *Ibid*, paras 157-159.

application of other rules of international law that are compatible with the Convention, but there is a ‘cardinal distinction’ between applicable law and jurisdiction.⁵² Thus, whilst it is permissible to refer to other rules of international law in the reasoning of a decision, it would seem to be go beyond the jurisdiction of a court if other rules are the basis of the dispositive of the judgment, as was the case in *M/V Saiga No. 2*.⁵³ It would have been preferable in that particular case to refer to Article 225, which would have arguably allowed the Tribunal to read a similar rule into the Convention as a matter of treaty interpretation, rather than relying upon the application of a rule that wasn’t found in the Convention at all.

The *M/V Saiga No. 2* is not a sole example of a willingness to look beyond the confines of the Convention for additional rules to curtail the enforcement powers of the coastal state. In another example, the Tribunal has made clear that, when exercising enforcement powers under Article 73, states must operate according to other general requirements under international law, including ‘that enforcement activities can be exercised only by duly authorized identifiable officials of a coastal state and that their vessels must be clearly marked as being on government service.’⁵⁴ As seen above, this requirement is found in relation to some specific EEZ offences.⁵⁵ Indeed, it has been applied to certain categories of fisheries enforcement actions under the Fish Stocks Agreement.⁵⁶ Yet, there is no express provision that applies this principle to fisheries enforcement in the EEZ.⁵⁷ There is clearly a lacuna in the Convention in this context. However, one is entitled to ask whether it is legitimate for the Tribunal, as a judicial organ to fill this gap. Even if one does not disagree with the substantive rule that is being applied in this case, the decision does raise questions about the circumstances in which the Tribunal is willing to go beyond the terms of the Convention. Frequent recourse to this tactic introduces a degree of uncertainty about

⁵² *MOX Plant Case*, Procedural Order No. 3 of 24 June 2003, para. 19. As was also explained in *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, Final Award of 2 July 2003, para. 85, failure to draw this distinction would have the result of creating ‘an unqualified and comprehensive jurisdictional regime in which there would be no limit *ratione materiae*.’

⁵³ See further J. Harrison, ‘Judicial Law-Making and the Developing Order of the Oceans’ (2007) 22 *I.J.M.C.L.* 283-302, 301.

⁵⁴ *M/V Virginia G Case* (n 13) para. 342. See also dispositive para. 12 in which it is clear that the Tribunal is extending a ‘principle’ found elsewhere in the Convention to the situation of fisheries enforcement in the EEZ.

⁵⁵ Law of the Sea Convention, Art. 224 on protection of the marine environment. See also Law of the Sea Convention, Art. 111(5) on hot pursuit.

⁵⁶ Fish Stocks Agreement, Art. 21(4) on subregional and regional cooperation in enforcement on the high seas.

⁵⁷ *M/V Virginia G Case* (n 13).

the precise balance of rights and interests contained therein and it threatens the integrity of the Convention regime.⁵⁸

3. Notification in Cases of Arrest or Detention of Foreign Vessels

Once an arrest has taken place in accordance with the applicable provisions of the Convention, a series of other obligations are potentially triggered. The first of these obligations is the duty to notify the flag state of the arrest.

Where the coastal state has arrested or detained a foreign fishing vessel, Article 73(4) establishes a duty of the coastal state to ‘promptly notify the flag state, through appropriate channels, of action taken and of any penalties subsequently imposed.’ The provision leaves it to the discretion of the coastal state to choose an appropriate channel.⁵⁹

A similar provision is found in relation to the inspection, arrest and commencement of proceedings for pollution offences. Article 231 requires the coastal state to not only notify the flag state or the measures taken by it, but also to ‘submit to the flag state all official reports concerning such measures.’

On the other hand, there are no similar provisions relating to arrests for other offences committed in the EEZ. It does not follow that equivalent obligations may not exist under other international instruments. For example, Article 36(1)(b) of the Vienna Convention on Consular Relations requires a state to inform, without delay, the consular authorities if a national of that state has been ‘arrested or committed to prison or to custody pending trial or is detained in any other manner.’⁶⁰ This provision would arguably apply to the arrest or detention of crew members in the EEZ. However, a key difference of this provision is that it does not cover the arrest of the ship and therefore, if the crew were of a different nationality to the flag of the vessel, the flag state may not receive notification that the vessel had been arrested. Moreover, these provisions would not be enforceable through the dispute settlement provisions of the Law of the Sea Convention, thus undermining their effectiveness as a potential safeguard.

⁵⁸ See also A. Boyle and J. Harrison, ‘Judicial Settlement of Environmental Disputes: Current Problems’ (2013) 4 *J.I.D.S.* 245-276: ‘a carefully structured dispute settlement scheme, such as Part XV of UNCLOS, is unlikely to survive expansive rewriting of this kind.’

⁵⁹ Any mention of consular or diplomatic channels were dropped from the text in the drafting process; Nordquist (n 40), 795.

⁶⁰ It was this provision which was the subject of dispute in the *La Grand Case* (2001) ICJ Reports 466.

4. Prompt Release

Another significant safeguard on the exercise of coastal state enforcement powers in the EEZ is the requirement of prompt release. Not only does the Convention contain several provisions on prompt release, but it also creates a specific dispute settlement procedure for this purpose. According to Article 292(1):

‘Where the authorities of a state Party have detained a vessel flying the flag of another state Party and it is alleged that the detaining state has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under article 287 or to the International Tribunal for the Law of the Sea, unless the parties agree otherwise.’

In exercising this power, a court or tribunal plays an important role in upholding the balance of interests enshrined in the EEZ regime. The following sections will consider how this balance has been struck in practice and what issues arise in the implementation of the prompt release provisions.

4.1 Prompt Release in the Case of Fisheries Offences

If the coastal state does exercise its powers of arrest in relation to fisheries vessels, Article 73(2) provides that it must offer to promptly release the vessels or crew, pending a trial, on payment of a bond or other financial security. Article 73 (2) only applies to vessels that have been arrested under laws and regulations relating to the exploration, exploitation, conservation and management of living resources in the EEZ. Yet, in the very first case to come before it, the Tribunal took a broad view of the interpretation of this provision. By a majority, it held that ‘laws or regulations on bunkering of fishing vessels may arguably be classified as laws or regulations on activities within the scope of the exercise by the coastal state of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic

zone.’⁶¹ Although the judgment in the *M/V Saiga Case* was adopted subject to the dissenting opinions of nine of judges⁶², the principle that the bunkering of fishing vessels in the EEZ falls within the sovereign rights of the coastal state was recently confirmed in the *M/V Virginia G Case*.⁶³ It follows that both fishing vessels and vessels performing support functions to fishing operations will fall within the scope of this procedure.

In interpreting and applying the substantive requirements of Article 73(2), the Tribunal has stressed the importance of balancing the interests of the coastal state and the flag state. As held by ITLOS in the *Monte Confurco Case*:⁶⁴

‘Article 73 identifies two interests, the interest of the coastal state to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag state in securing prompt release of its vessels and their crews from detention on the other. It strikes a fair balance between the two interests. It provides for release of the vessel and its crew upon the posting of a bond or other security, thus protecting the interests of the flag state and of other persons affected by the detention of the vessel and its crew.’

The principal obligation in Article 73(2) is to release the vessel upon payment of a bond. Thus, the arresting state is under an obligation to set a bond. The Convention does not specify the precise procedures that must be followed by the coastal state in setting a reasonable bond and the Tribunal has accepted that coastal states have some discretion to ‘determine the most appropriate procedure in accordance with its national law.’⁶⁵

Nor does the Convention set a precise time limit for the arresting state to do this. However, the Tribunal in interpreting and applying this provision has stated that

⁶¹ *M/V Saiga Case*, ITLOS Judgment of 4 December 1997, para. 63.

⁶² Dissenting opinions were delivered by President Mensah, Vice-President Wolfrum, and Judges Yamamoto, Park, Nelson, Chandrasekhara Rao, Vukas, Ndiaye, and Anderson.

⁶³ *M/V Virginia G Case* (n 13) para. 217. See, however, the accusation of judicial law-making by Judge Lucky in his Separate Opinion, para. 27.

⁶⁴ *Monte Confurco Case*, ITLOS Judgment of 18 December 2000, para. 70.

⁶⁵ *M/V Virginia G Case* (n 13) para. 284. See also para. 285: ‘The Tribunal observes that the practice of coastal states varies in this regard. In some coastal states the bond or other security is determined by the competent court on the basis of an application submitted by the owner or captain of a detained or arrested vessel. In other coastal states it is the executive branch that determines the bond or other security.’

‘the time required for setting a bond should be reasonable.’⁶⁶ If the arresting state has not complied with this obligation, then the flag state may apply for the prompt release of the vessel and the bond will be set by ITLOS or other agreed forum.⁶⁷ In practice, the allowance of a reasonable period of time to set a bond is likely to operate as a defence for the coastal state against premature applications for prompt release. Yet, it is unlikely that coastal states will be given too much leeway in this regard. Judge Tuerk noted in the *Hoshinmaru Case* that ‘[t]he exact time-period for the setting of a bond will certainly depend on the degree of complexity of the investigations carried out by the detaining State and will thus have to vary from case to case’, but he went on to suggest that ‘a maximum period of approximately one month after the detention of a vessel and its crew would seem reasonable for the setting of the bond.’⁶⁸ Indeed, one could argue that the text of the Convention supports the right of a flag state to initiate the prompt release procedure after 10 days and it is doubtful whether a court or tribunal should seek to construct a different reasonable period of time on the basis of abstract criteria. From this perspective, the defence would not offer much sanctuary to the coastal state.

It is not only in situations where no bond has been set that the Convention provides a right to challenge the actions of the coastal state. Although it is up to the coastal state in the first instance to determine the level of the bond, Article 292 provides a procedure through which the reasonableness of a bond can be challenged by or on behalf of the flag state and the issue will be settled by ITLOS or another agreed forum.⁶⁹ Determining a reasonable bond involves the balance of the interests of the coastal state and the flag state. There have been nine prompt release cases brought to the Tribunal to date and it has therefore had an opportunity to develop a jurisprudence on what factors should be taken into account by coastal states when setting a reasonable bond. Amongst the relevant considerations are ‘the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining state, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining state and its form’⁷⁰, although this is not a closed list of factors and the Tribunal has expressly stated that it does not ‘intend to lay down rigid

⁶⁶ *Hoshinmaru Case*, ITLOS Judgment of 6 August 2007, para. 80.

⁶⁷ *M/V Saiga Case* (n 61) para. 77.

⁶⁸ *Hoshinmaru Case*, Declaration of Judge Tuerk, para. 3.

⁶⁹ *M/V Saiga Case* (n 61) para. 77; *Hoshinmaru Case* (n 66) para. 65. See also ITLOS Rules of Procedure, Art. 113(2).

⁷⁰ *Camouco Case*, ITLOS Judgment of 2 February 2000, para. 67.

rules as to the exact weight to be attached to each of them.’⁷¹

It is clear that the process of setting a bond involves a case-by-case analysis. Following the basic principle of evidence, the burden of showing that the bond is unreasonable should fall upon the applicant. What is less clear is what standard of review is being applied by the Tribunal. In this regard, the Rules of the Tribunal provide that:⁷²

‘The Tribunal shall in its judgment determine in each case in accordance with article 292 of the Convention whether or not the allegation made by the applicant that the detaining state has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded.’

In the *Juno Trader Case*, the Tribunal added that ‘[t]he assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties.’⁷³ The Tribunal has also stressed that it is not acting as a court of appeal.⁷⁴ Rather, it would appear that the Tribunal considers itself as carrying out an exercise of judicial review, similar to the process of reviewing the necessity of enforcement measures against foreign fishing vessels. This suggests that there is a margin of appreciation for the coastal state in setting the level of the bond. Indeed, it can be argued that such a margin of appreciation is implicit in the notion of reasonableness itself.⁷⁵ This is supported in the reasoning of Judge Anderson in the

⁷¹ *Monte Confurco Case* (n 64) para. 76.

⁷² ITLOS Rules of Procedure, Art. 113(1).

⁷³ *Juno Trader Case*, ITLOS Judgment of 18 December 2004, para. 85.

⁷⁴ *Monte Confurco Case* (n 64) para. 89.

⁷⁵ *Camouco Case*, Declaration of Judge Laing: ‘every day judicial bodies everywhere must objectively and impartially determine whether or not actions are reasonable, which is a neutral and unpejorative expression. According to *Black’s*, it carries the connotation of proportionality, balance, fairness, propriety, moderateness, suitability, tolerableness and or in excessiveness. Among the synonyms which one can add is consistency. In the case of prompt release proceedings, the appropriate perspective is that of an international standard determined to be proper by the Tribunal. Generally, this will be on a plane and have a content that differs from those of domestic law. Certainly, in making determinations of reasonableness in prompt release cases, the Tribunal should never seek or appear to enforce the domestic laws of the detaining state or even substantive aspects of the Convention. I believe that the Judgment satisfies these tests. Equally and importantly, in determining reasonableness, the Tribunal must not and does not normally imply criticism of the domestic law or institutions of either litigant state. For one thing – prompt release proceedings are in no way akin to situations in which the international minimum standard is applied in substantive proceedings involving assertions of state delictual responsibility.’

Camouco Case, where he opined that:⁷⁶

‘the local court should be accorded a wide discretion in fixing the amount of the security for release pending trial. In other words, national courts should be accorded a broad “margin of appreciation” In my view, it follows that an Applicant has to show very strong grounds for reducing the amount of the security fixed by a national court under local law in order to succeed under article 292.’

Yet, it is not always clear that the Tribunal has followed this approach. The Tribunal would appear to be willing to overturn the bond set by the coastal state without explaining in detail why it is unreasonable and several judges have expressed dissatisfaction with the process, calling for greater clarity in this regard.⁷⁷ Some judges have even gone as far as criticizing the Tribunal for rendering the right of the coastal state to take enforcement proceedings ‘an empty shell.’⁷⁸ Unless the Tribunal exercises its power with caution, it is likely to upset the balance set out in the Convention and to undermine the sovereign rights of the coastal state.

Not only has the Tribunal policed the amount of the bond that may be imposed by the coastal state, it has also determined what is meant by a bond in the context of Article 73(2). In the *Volga Case*, the Tribunal held that:⁷⁹

‘[T]he expression “bond or financial security” in article 73, paragraph 2, should, in the view of the Tribunal, be interpreted as referring to a bond or security of a financial nature. [...] It follows from the above that the non-financial conditions cannot be considered components of a bond or other financial security for the purpose of applying article 292 of the Convention in respect of an alleged violation of article 73, paragraph 2 of the Convention.’

⁷⁶ *Camouco Case*, Dissenting Opinion of Judge Anderson. See also Dissenting Opinion of Judge Wolfrum, paras 11-14.

⁷⁷ *Camouco Case*, Separate Opinion of Judge Laing: ‘It is important that the Tribunal should carefully develop its jurisprudence on the issue of reasonableness’; see also Dissenting Opinion of Judge Wolfrum, para. 3.’ The Judgment does not give appropriate guidance on what basis it assesses a bond set by national authorities, on what are the possible reasons to declare a national bond to be unreasonable and on what are the criteria it uses to determine the amount of the bond set by the Tribunal.’

⁷⁸ *Camouco Case*, Dissenting Opinion of Judge Wolfrum, para. 8. See also para. 15: ‘If the bond set by the Tribunal is lower than the fines against the Master and the owners the French authorities will find it more difficult, if not impossible, to collect them. This means, in essence, that setting a bond which is too low – which is the case here – means that the enforcement rights of coastal state concerning its laws on the management of marine living resources in the exclusive economic zone have been curtailed.’

⁷⁹ *Volga Case*, ITLOS Judgment of 23 December 2002, para. 77.

On this basis, the Tribunal concluded that ‘a “good behaviour bond” to prevent future violations of the laws of a coastal state cannot be considered as a bond or security within the meaning of article 73, paragraph 2, of the Convention read in conjunction with article 292 of the Convention.’⁸⁰ Thus, the requirement for the vessel to carry a vessel monitoring system pending the conclusion of the criminal proceedings was not permissible under the Convention.⁸¹ This is an important decision for the balance between coastal state and flag state interests because it demonstrates the constraints that are imposed on the coastal state in this context.

In the *Volga Case*, the Respondent also challenged the bail conditions imposed on the crew members. Initially, the crew members had been released from custody, but they had been required to surrender their passports and seaman's papers to the Australian authorities and to stay within the Perth metropolitan area. After appealing these bail conditions, the crew concerned were permitted to return to Spain, but they were required to surrender their passports and seaman's papers to the Australian embassy in Madrid, and they were also required to report monthly to consular officials. The Tribunal did not deal with this point in its decision.⁸² However, in light of its reasoning on the other aspects of the case, it is likely that any non-financial conditions attached to the release of the crew would also be contrary to the requirements of Article 73 (2).

4.2 Prompt Release in the Case of Environmental Offences

The other situation in which the Convention expressly establishes an obligation of prompt release is in relation to environmental offences. There are two relevant provisions in the Convention, one of which has a more general application than the other.

Firstly, Article 220(7) provides that where the coastal state has agreed to specific procedures for the release of a vessel upon payment of a bond in another instrument, it shall comply with these provisions. This provision does not establish an independent obligation of prompt release⁸³, although it would allow the relevant states

⁸⁰ Ibid., para. 80.

⁸¹ However, see the dissenting opinions of Judge Anderson and Judge Ad Hoc Shearer.

⁸² *Volga Case* (n 79) para. 74.

⁸³ See T. Treves, ‘The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea’ (1996) 11 *I.J.C.M.L.* 179-200, 183.

to utilize the mechanism in Article 292 for the purposes of enforcing prompt release procedures contained in other agreements.

In contrast, Article 226(1)(b) does establish an obligation in relation to environmental offences whereby ‘release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.’ This provision applies to proceedings for the enforcement of ‘applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment’⁸⁴ and it would therefore cover dumping and pollution offences.⁸⁵

The crux of the provision is the determination of whether a bonding requirement imposed by the coastal state on the detained vessel is ‘reasonable.’ This is a similar requirement to Article 73(2) and it would also demand the balancing of coastal state and flag state interests. To date, there have been no cases brought on the basis of Article 226(1)(b) and therefore it is not entirely clear how it will be interpreted in practice. One key question that will arise is whether the bonding and financial security are just examples of ‘reasonable procedures’ and whether a coastal state could impose additional bonding requirements on vessels. As noted above, this interpretation has been rejected in relation to Article 73(1) of the Convention. Yet, the language in Article 226(1)(b) is noticeably different and it is possible that it could have a wider meaning.⁸⁶

There are other important differences in the nature of the bonding process in relation to environmental offences. In this situation, prompt release is not an absolute right and a coastal state may refuse to release a vessel ‘whenever it would present an unreasonable threat of damage to the marine environment.’⁸⁷ Alternatively, a coastal state may make release conditional upon the ship proceeding to the nearest appropriate repair yard to have work carried out to make the vessel seaworthy. This power of the coastal state supports a broader reading of the notion of ‘reasonable procedures’ in Article 226(1)(b).

At the same time, it must be noted that the decision of a coastal state to refuse

⁸⁴ Law of the Sea Convention, Art. 226(1)(b).

⁸⁵ Anderson (n 15) 175.

⁸⁶ As noted by the leading commentary on the Convention, it is possible that the language in Article 226(1)(b) was chosen in order to ‘avoid any technical legal connotation which different legal systems might attach to the word “bond”’; M. Nordquist et al (eds), *The United Nations Convention on the Law of the Sea 1982 – A Commentary*, vol. 4 (Martinus Nijhoff Publishers, 1991) 272.

⁸⁷ Law of the Sea Convention, Art. 226(1)(c).

to release the vessel or to make it conditional are also subject to challenge using the Article 292 procedure and it will be up to the relevant court or tribunal to decide whether the decision is ‘reasonable.’ As with the case of fisheries offences, it is suggested that the coastal state should be given a margin of appreciation and the court or tribunal should only intervene if the decision of the coastal state was not supported by any evidence or arbitrary. In making such an assessment, a court or tribunal may also have to take into account the precautionary approach which implies that a further degree of deference should be given to the coastal state when there is uncertainty about the risks posed to the environment.⁸⁸

4.3 Prompt Release for other EEZ Offences?

The question arises whether there is a more general right to prompt release following an arrest in the EEZ. In the *M/V Saiga Case*, Saint Vincent and the Grenadines had suggested that ‘the applicability of article 292 to the arrest of a vessel in contravention of international law can also be argued, without reference to a specific provision of the Convention for the prompt release of vessels or their crews.’⁸⁹ In making this argument, Saint Vincent and the Grenadines suggested that ‘it would be strange that the procedure for prompt release should be available in cases in which detention is permitted by the Convention (articles 73, 220 and 226) and not in cases in which it is not permitted by it.’⁹⁰ Given the broad interpretation of Article 73 adopted by the Tribunal in the *M/V Saiga Case*, it was unnecessary for it to address this broader argument⁹¹ and therefore the issue remains open.

In order to determine the validity of this argument, it is necessary to refer back to the text of Article 292. The key part of this provision would seem to be the reference to compliance with ‘the provisions of this Convention for the prompt release of a vessel or crew.’ In other words, invocation of the Article 292 procedure would appear to be dependent upon the existence of another provision for the prompt release of a vessel or crew.⁹² It follows that prompt release procedure has a limited

⁸⁸ See Rio Declaration, Principle 15: ‘where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’

⁸⁹ *M/V Saiga* (n 50) para. 53.

⁹⁰ *Ibid*, para. 53.

⁹¹ *Ibid*, para. 73.

⁹² However, see, to the contrary, Treves (n 83) 186: ‘... it would seem possible to resort to the prompt release procedure in other cases also. There are cases in which the Convention prohibits detention of ships and crews. If a vessel or its crew has been detained in contravention of the Convention which

applicability and it would not be available for all situations in which the coastal state has exercised its enforcement powers in relation to the EEZ.⁹³ In particular, the prompt release procedure would not be available for the exercise of enforcement powers in relation to jurisdiction over marine scientific research or jurisdiction over artificial islands, installations and structures.

At the same time, the limited availability of the prompt release procedure under Article 292 does not mean that the release of a vessel cannot be requested through international dispute settlement procedures. In practice, states have sought to make requests for provisional measures in order to achieve this aim.⁹⁴ In the *M/V Louisa Case*, Saint Vincent and the Grenadines requested the Tribunal to ‘order the Respondent to release the vessel *Louisa* and its tender, the *Gemini III*, upon such terms and conditions as the Tribunal shall consider reasonable.’⁹⁵ On the facts of the case, the Tribunal held that it was not appropriate to consent to the request.⁹⁶ In contrast, in the *Arctic Sunrise Case*, the Tribunal did find it appropriate to order the release of a vessel as a provisional measure. Indeed, what is striking about the decision is the parallel that can be drawn to the prompt release procedure. The Netherlands had requested, inter alia, that the Russian Federation be ordered:⁹⁷

‘to immediately enable the ‘Arctic Sunrise’ to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation;

to immediately release the crew members of the ‘Arctic Sunrise’, and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation...’

prohibits detention, it seems reasonable to hold that the most expeditious procedures available should be resorted to in order to ensure the release of the vessel or crew, independently of the question of international responsibility for the violation of the Convention.’ However, this argument ignores that Article 292 refers to provisions of the Convention ‘for the prompt release of the vessel or crew’, not provisions of the Convention relating to detention. As noted below, the flag state could in these circumstances apply for the release of the vessel or crew as a provisional measure.

⁹³ Anderson (n 15) 169.

⁹⁴ See Oxman (n 4) 207; Anderson (n 15) 177, noting that ‘the exact relationship of Article 290 (provisional measures) and Article 292 will have to be established by practice and precedent.’

⁹⁵ *M/V Louisa*, ITLOS Order on Provisional Measures of 23 December 2010, para. 33.

⁹⁶ *Ibid*, para. 72.

⁹⁷ *Arctic Sunrise*, Order on Provisional Measures, para. 35.

Although the request did not make any mention of any conditions attached to the release of the vessel and the crew, the Tribunal exercised its power to prescribe provisional measures that are different from those that are requested⁹⁸ and it held that ‘under article 290 of the Convention, it may prescribe a bond or other financial security as a provisional measure for the release of the vessel and the persons detained.’⁹⁹ The Tribunal went on to set a bond of 3,600,000 euros.

Not all judges accepted that an order for prompt release was an appropriate use of the power to prescribe provisional measures, however. Judge Jesus considered that the case represented a ‘back-door prompt release.’¹⁰⁰ His particular concern was not related to the release of a vessel as a provisional measure per se, but rather to the conditioning of such a release on the posting of a reasonable bond.¹⁰¹ In addition, he observed that ‘a bond imposed as a condition for the release of vessel and crew in the framework of provisional measures, as in the present case, may not “preserve the rights” of the detaining state in cases in which the imposed or imposable penalties may involve imprisonment terms which, under the applicable domestic law, may not be convertible into a monetary penalty.’¹⁰² Similarly, Judge Golitsyn was also critical of the decision of the Tribunal, arguing that ‘by ordering the release of the Arctic Sunrise and all detained members of its crew, upon posting of a bond or other financial security, the Tribunal completely disregarded the rights of the Russian Federation.’¹⁰³

These arguments do bear some weight but the decision of whether or not to release must ultimately come down to a weighing and balancing the rights of either side to the dispute. Such a balancing process between the rights of the applicant and the respondent is inherent in the prescription of provisional measures, in the same way that it is in prompt release proceedings.

Overall, there would appear to be good arguments to keep open the option for prompt release in the case of provisional measures proceedings. At the same time, it

⁹⁸ *Arctic Sunrise*, ITLOS Order on Provisional Measures of 22 November 2013, para. 94.

⁹⁹ *Ibid*, para. 93. The Netherlands had itself offered a bond in its communication with the Russian Federation; *ibid*, para. 91.

¹⁰⁰ *Arctic Sunrise*, Separate Opinion of Judge Jesus, para. 7(b).

¹⁰¹ *Ibid*, para. 7(c). See also *Arctic Sunrise*, Dissenting Opinion of Judge Golitsyn, para. 49: ‘it is questionable whether the Tribunal can prescribe the release of the ship upon the posting of a reasonable bond under article 290, paragraph 5, of the Convention.’

¹⁰² *Arctic Sunrise*, Separate Opinion of Judge Jesus, para. 11. See also Dissenting Opinion of Judge Kulyk, para. 14.

¹⁰³ *Arctic Sunrise*, Dissenting Opinion of Judge Golitsyn, para. 45.

must be recognized that there are fundamental differences between the two procedures.¹⁰⁴ First and foremost, there is no right to prompt release as a provisional measures. Rather the decision to order a release or not will also depend upon the outcome of the weighing and balancing process. Similarly, a weighing and balancing process will determine the amount of a bond associated with the release of the vessel. Moreover, it should also be noted that release as a provisional measure does not necessarily depend upon the posting of a bond and it is perfectly possible to order the release of a vessel as a provisional measure without any financial security at all.¹⁰⁵ Again, this will depend upon the rights being exercised by the coastal state and the facts of a particular case. Thus, the decision of whether or not to order the release of a vessel as a provisional measure is another example of international courts and tribunals playing a central role in upholding the balance of interests between coastal state rights and the interests of other states.

5. Limits on Penalties to be imposed by Coastal state for EEZ Offences

Generally speaking, it is up to the authorities of a state to determine what is an appropriate punishment for a particular offence. As a matter of principle, states should be considered to have a broad discretion in this regard, subject to any express conditions imposed by international law. The Law of the Sea Convention only contains provisions on this subject matter in relation to fisheries offences and environmental offences.

5.1 Penalties for Fisheries Offences

Article 73 also deals with the powers of a coastal state to impose punishments for violations of fisheries laws and regulations if an offender is found guilty at trial. Firstly, it completely prohibits corporal punishment for fisheries offences.¹⁰⁶ Secondly, it restricts the use of imprisonment as a form of punishment without the agreement of the concerned state.¹⁰⁷

¹⁰⁴ See *Arctic Sunrise*, Dissenting Opinion of Judge Kulyk, para. 12.

¹⁰⁵ For example, the *ARA Libertad Case*, Order on Provisional Measures of 15 December 2012.

¹⁰⁶ Law of the Sea Convention, Art. 73 (3).

¹⁰⁷ Anderson has argued that ‘paragraph 3 does not rule out imprisonment for willful refusal to pay a penalty imposed by a competent court’; Anderson (n 15) 170. In the *M/V Virginia G Case*, the Tribunal rejected the arguments put forward by Panama that confinement to the ship and the temporary

Within the limits set by Article 73, coastal states clearly have some discretion as to the types of penalties that they may impose on fishing vessels which are found to have violated their laws and regulations. By way of example, ITLOS has confirmed that such penalties may include the confiscation of a fishing vessel even though it is not explicitly mentioned by Article 73.¹⁰⁸ At the same time, it was also noted that ‘confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag state and of the coastal state established in the Convention.’¹⁰⁹ In the words of the Tribunal, ‘such a decision [to confiscate] should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag state from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law.’¹¹⁰ The reference to international standards of due process of law is significant as it introduces another general safeguard on the exercise of coastal state powers. Presumably, the reference would include international human rights provisions relating to the right to a fair trial. In other words, ITLOS has conferred on itself the power to step inside the courtroom and to determine whether national courts are complying with international human rights standards when trying fisheries cases. In this context, the Tribunal has also decided that penalties for fisheries offences must pass the necessity test included in Article 73(1).¹¹¹ As noted above, the concept of ‘necessary’ is ambiguous and it should be applied with care to enforcement measures. This is particularly the case in relation to the imposition of penalties. In the *Virginia G Case*, the Tribunal applied the necessity test at two levels.

holding of passports amounted to imprisonment, in violation of the Convention; *M/V Virginia G Case* (n 13) paras 308, 310. See however, the Separate Opinion of Judge Lucky, para. 50 who says ‘the word “imprisonment” in article 73, paragraph 3, must be given a wide and generous meaning. The meaning ascribed ought not to be that the individual must be sent to a prison and confined in cell. The term imprisonment means the restraint of a person contrary to his will; in other words it means a deprivation of one’s liberty. As to what will amount to imprisonment, the most obvious modes are confinement in a prison or private house (in this case a ship). In my view the crew were deprived of their right to liberty and freedom.’ He does not explain, however, why the term imprisonment must be given a ‘wide and generous meaning’ and not its ‘ordinary meaning’ in light of the context and object and purpose, as required by Article 31(1) of the Vienna Convention on the Law of Treaties.

¹⁰⁸ *Tomimaru Case*, ITLOS Judgment of 6 August 2007, para. 72. See also *M/V Virginia G Case* (n 13) para. 255.

¹⁰⁹ *Tomimaru Case* (n 108) para. 75.

¹¹⁰ *Ibid*, para. 76.

¹¹¹ See *M/V Virginia G Case* (n 13) para. 257. See also Dissenting Opinion of Judge ad hoc Servulo Correia, para. 23: ‘The concept of “judicial proceedings” is indeterminate. The practice of states shows that the expression “as may be necessary to ensure compliance with the laws and regulations ...” includes sanctions and that confiscation is one of them.’

Firstly it applied the test to a penalty in the abstract. Thus, the Tribunal had to decide whether the confiscation of a vessel offering bunkering services to foreign vessels fishing in the EEZ was necessary.¹¹² The Tribunal relied upon ‘the practice of coastal states on the sanctioning of violations of fishing laws and regulations’¹¹³ in order to determine that it was a necessary measure.

Secondly, and more decisively, the necessity test was also applied to the concrete application of a penalty in a particular case.¹¹⁴ It is in this context that the Tribunal found, by a majority, that the confiscation of the *M/V Virginia* and the gas oil on board were not necessary, despite the fact that it accepted that the offence committed by the vessel was a ‘serious violation.’¹¹⁵ A number of ‘mitigating factors’¹¹⁶ were considered by the Tribunal in reaching this decision. In particular, it took into account the fact that Guinea Bissau had been informed of the bunkering activities, even though the proper procedures for authorization had not been followed.¹¹⁷ It also took into account that the other vessels involved in the bunkering operations were not confiscated and it concluded that ‘the confiscation of the vessel and the gas oil on board in the circumstances of the present case was not necessary either to sanction the violation committed or to deter the vessels and their operators from repeating this violation.’¹¹⁸ In practice, the approach of the Tribunal appears to be closer to a proportionality test, given that the aims of the measure are weighed against the means through which they are carried out.¹¹⁹ The approach of the Tribunal can be seen as problematic in two ways.

Firstly, it must be wondered whether the necessity test should be applied to penalties at all. As noted by Judge Kulyk in his declaration, enforcement measures

¹¹² *M/V Virginia G Case* (n 13) para. 257. The Tribunal noted that were confiscation the automatic remedy for all violations of its fisheries laws, it may have questioned the necessity of the measure. However, it recognized that the authorities had flexibility in deciding whether to confiscate the oil on board the vessel.

¹¹³ *Ibid.*, para. 253.

¹¹⁴ *Ibid.*, para. 257.

¹¹⁵ *Ibid.*, para. 267.

¹¹⁶ *Ibid.*, para. 268.

¹¹⁷ *Ibid.*, para. 269. See however the dissenting opinion of Judge ad hoc Servulo Correia, para. 15; Declaration of Judge Gao, para. 30.

¹¹⁸ *M/V Virginia G Case* (n 13) para. 269.

¹¹⁹ For a discussion of the pros and cons of proportionality in international litigation, see e.g., M. Andenas and S. Zleptnig, ‘Proportionality: WTO Law in Comparative Perspective’ (2007) 42 *Texas Int’l L. J.* 371; C. Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15 *J.I.E.L.* 223-255. More generally, see B. Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing, 2013).

should be distinguished from sanctions for offences.¹²⁰

Secondly, the way in which the necessity was applied would seem to be too prescriptive, leaving little discretion to the coastal state. In their joint dissenting opinion, Vice President Hoffman and Judges Rao, Marotta Rangel, Kateka, Gao, and Bouguetaia stressed the importance of granting a margin of appreciation to the coastal state in making enforcement decisions in relation to fisheries offences and they criticized the Tribunal for having functioned more akin to an appellate authority.¹²¹ The dissenting judges suggested that the Tribunal should only exercise the power of review if ‘there is manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous.’¹²² Further more, in applying a reasonableness test to the facts of the case, they did not believe that the measures taken by Guinea Bissau were unreasonable.¹²³ Judge ad hoc Servulo Correia came to a similar conclusion, finding that ‘[u]nder paragraph 1 of article 73, judicial deference is only excluded when it is manifest or absolutely clear that a less intrusive or onerous measure would have been equally suitable and effective in attaining the legal aim. But only in extreme cases is it possible to reach such a conclusion where the policy choices are of a discretionary nature.’¹²⁴

Rather confusingly, alongside the necessity test, the Tribunal also applies a test of reasonableness to the sanctions imposed by Guinea Bissau in the *M/V Virginia G Case*. The Tribunal explained, ‘the principle of reasonableness applies generally to enforcement measures under article 73 of the Convention.’¹²⁵ It does not explain the origins of this principle. Furthermore, it is equally not clear what content is given to the reasonableness standard employed by the Tribunal in this context. It would not seem to differ to any extent from the necessity analysis already carried out. Thus, even when applying a reasonableness test, the Tribunal also fails to give any margin of appreciation to the coastal state. In doing so, the Tribunal arguably tips the balance in favour of the interests of the flag state and it undermines the sovereign nature of the

¹²⁰ *M/V Virginia G Case*, Declaration of Judge Kulyk, para. 9. A similar conclusion was reached by Judge Jesus, albeit on slight different grounds; Dissenting Opinion of Judge Jesus, paras 17-20.

¹²¹ *M/V Virginia G Case*, Dissenting Opinion of Vice President Hoffman and Judges Rao, Marotta Rangel, Kateka, Gao, and Bouguetaia, para. 55.

¹²² *Ibid*, para. 54.

¹²³ *Ibid*, paras 56-57.

¹²⁴ *M/V Virginia G Case*, Dissenting Opinion of Judge ad hoc Servulo Correia, para. 21.

¹²⁵ *M/V Virginia G Case* (n 13) para. 270.

rights possessed by the coastal state in relation to fisheries in the EEZ.

5.2 Penalties for Environmental Offences in the EEZ

The scope for the coastal state to impose penalties in relation to environmental offences is even more limited than in relation to fisheries. The Convention provides that in this situation, ‘monetary penalties only may be imposed.’¹²⁶ Thus, the Convention prescribes a single penalty that may be applied to environmental offences.

At the same time, it would not appear that the Convention limits the discretion of states in setting appropriate monetary penalties. It has been noted in a slightly different context that ‘the Convention does not put a limit on the amount of fines against violators a coastal state may consider appropriate.’¹²⁷ Indeed, related international treaties encourage states to set penalties that are ‘adequate in severity to discourage violations’ in the future.¹²⁸ Even if one were to imply a general test of reasonableness in relation to penalties for environmental offences, there should be a wide margin of appreciation given to the coastal state in this matter.

The Convention also requires that proceedings in which a penalty may be imposed must respect ‘the recognized rights of the accused.’¹²⁹ The Convention does not specify what these rights are, although it can be argued that a court or tribunal would interpret this provision in light of the international human right to a fair trial.¹³⁰

6. International Review of Coastal State Enforcement Powers

It has been seen in the preceding analysis that the Convention seeks to establish a delicate balance between the power of coastal states to protect its sovereign rights interests in the EEZ and the freedom of navigation of foreign ships in that zone. Many of these safeguards use concepts such as necessity or reasonableness in order to determine when it is legitimate for a coastal state to exercise enforcement powers in the EEZ. It has been argued throughout this paper that the concept of sovereign rights

¹²⁶ Law of the Sea Convention, Art. 230(1).

¹²⁷ *Camouco Case*, Dissenting Opinion of Judge Wolfrum, para. 6. See also Dissenting Opinion of Judge Anderson.

¹²⁸ MARPOL Convention, Art. 4(4).

¹²⁹ Law of the Sea Convention, Art. 230(3).

¹³⁰ According to the leading commentary on the text, ‘guidance may be found in the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966, as well as in other global and regional instruments dealing with human rights, regarding the concept of “fair trial” and the rights of an accused person’; Nordquist (n 86) 370.

implies that the coastal state should have a degree of deference in deciding whether to take enforcement action. Nevertheless, the discretion of a coastal state cannot be unlimited and the safeguards in the Convention provide an important check against the excessive exercise of enforcement powers in a way that would undermine the rights and interests of other state. However, the effectiveness of these safeguards also depends upon the availability of an international court or tribunal to intervene when it was alleged that a coastal state had exceeded its powers.

The Law of the Sea Convention is well-known for its dispute settlement procedure. Generally speaking, any party can bring a claim against another party to the Convention if a dispute exists between them, provided that they satisfy certain procedural prerequisites.¹³¹ Where such a procedure exists, the safeguards provide an effective mechanism to uphold the balance of rights inherent in the Convention regime.¹³²

Nevertheless, not all states were willing to submit all issues to international adjudication and a number of mandatory and optional exceptions are included in Articles 297 and 298 of the Convention respectively. The optional exceptions from the compulsory dispute settlement proceedings include ‘disputes concerning law enforcement activities in regard to the exercise of sovereign rights excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.’¹³³ Although this exclusion must be explicitly claimed by a party to the Convention to be valid, many states have done so in practice.¹³⁴ Therefore, it serves to shelter enforcement actions covered by the exclusion from international scrutiny and it undermines the effectiveness of the safeguards.

The cross-reference in this provision to Article 297(2) and (3) covers disputes concerning the law enforcement activities in relation to marine scientific research and fisheries. It follows that it would not be possible to initiate proceedings relating to the enforcement powers of coastal states in relation to fishing and marine scientific research if it had invoked these exceptions to compulsory dispute settlement under the Convention. In contrast, disputes concerning enforcement activities in relation to environmental offences or offences committed in the safety zone of an artificial

¹³¹ Law of the Sea Convention, Art. 287.

¹³² Franckx (n 5) 324.

¹³³ Law of the Sea Convention, Art. 298(1)(b).

¹³⁴ For a list of states which have taken up the optional exclusion under Art. 298 (1)(b) UNCLOS, see http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm#Choice%20of%20procedure (last visited on 13 May 2014).

island, installation or structure would not fall within the scope of this exclusion.¹³⁵ It follows that there is more likelihood that these safeguards will be enforceable in practice and they will prove a more effective limit on the powers of the coastal state in the EEZ.

7. Conclusion

This paper has demonstrated the range of safeguards that apply to coastal states when exercising their enforcement powers in the EEZ. Some of these safeguards are procedural in nature, such as the duty to inform the flag state when a vessel is arrested. However, some of the safeguards go to the core of what action a coastal state may take to enforce its national laws and regulations in the EEZ. This is particularly the case with the limitations on what enforcement measures may be taken and what penalties may be imposed.

The safeguards are important because they prevent the coastal state from using their EEZ powers to infringe upon legitimate freedom of navigation. At the same time, it is necessary to ensure that the safeguards are not interpreted too strictly, otherwise the powers of the coastal state in the EEZ will be undermined. Thus, many of the safeguards involve some sort of balancing exercise, which takes into account both interests of the coastal state and the flag state.

It is clear that international courts and tribunals have played a key role in carrying out this balancing process when interpreting and applying the various safeguard provisions in the Convention. Yet, the jurisprudence demonstrates that there is still some disagreement on precisely how this balance should be struck. In particular, there is no consensus on how much discretion should be given to coastal states in deciding what enforcement measures should be taken against foreign vessels in their EEZ. This is clearly an issue where the decisions of the Tribunal have been lacking in clarity and there is scope for the jurisprudence to develop further. The present author takes the view that the Tribunal has sometimes gone too far in its scrutiny of coastal state enforcement and it should give a broader margin of

¹³⁵ See e.g. *Arctic Sunrise* (n 98) para. 45: ‘in the view of the Tribunal, the declaration made by the Russian Federation with respect to law enforcement activities under article 298, paragraph 1(b), of the Convention *prima facie* applies only to disputes excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3, of the Convention.’ Thus, the Tribunal implied that this exclusion could not be invoked in a case involving jurisdiction over an artificial installation in the EEZ.

appreciation in deciding whether EEZ enforcement action is reasonable, appropriate or necessary for the purposes of the Convention. This view not only better reflects the nature of the rights and jurisdiction possessed by the coastal state in this zone, but it also prevents international courts and tribunals from stepping beyond their judicial character and substituting their own decisions for those of the coastal state authorities.